IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2007 Session

MALCOLM HINSON v. CITY OF COLUMBIA

Appeal from the Chancery Court for Maury County
No. 05-015 Robert L. Jones, Judge

No. M2006-02264-COA-R3-CV - Filed December 27, 2007

The issue presented to this court is whether the Chancery Court was correct in affirming the decision of a civil service board to terminate a city employee on the ground that he "knowingly received pay he did not earn." On appeal the employee contends that notice of the charge was inadequate and that there was not material and substantial evidence to support the board's decision. We agree that the notice was inadequate, and we have also determined that the board's decision was arbitrary and capricious. Accordingly, the Chancery Court judgment is reversed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

E. RILEY ANDERSON, SP.J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR. JJ., joined.

Renee Andrews-Turner, Murfreesboro, Tennessee, for the appellant, Malcolm Hinson.

C. Tim Tisher, Columbia, Tennessee, for the appellee, City of Columbia.

OPINION

I. BACKGROUND

Malcolm Hinson was employed by the City of Columbia, Tennessee for twelve years, primarily as a traffic maintenance technician for the Department of Public Works. Hinson arrived at work on the morning of Friday, June 25, 2004 at the regular time and began his normal duties. A friend of Hinson's called him at work and told him Parker Elliott's truck had been seen near Hinson's home. Parker Elliott was a former neighbor of Hinson's who had allegedly murdered his wife and daughter a few days earlier and was still at large. Hinson told the administrative staff at work that he had to leave for home immediately to protect his family. Hinson later testified that he feared for his family's safety and in his rush he simply forgot to clock out.

After Hinson got home the police came and questioned him about Parker Elliott. They asked

him to notify them immediately if he saw or heard from the suspect. Hinson did not return to work that Friday or the next work day, Monday June 28, 2004. Parker Ellott was captured by law enforcement on Monday and Hinson returned to work on Tuesday, June 29, 2004. The city does not dispute Hinson's testimony in this respect. The timekeeping record, however, indicated that Hinson's time card was clocked out at 3:26 p.m. at the end of the work day on Friday. The city questioned all the other workers in Hinson's group about the time card. They all signed handwritten statements denying that they had clocked out for him. On Tuesday, Hinson signed a leave request form asking for paid leave on Monday, June 28, but not for Friday June 25. He said the reason he did not was that he had used almost all his vacation and sick leave time, and knew he was only entitled to one additional day of paid leave.

In accordance with the City of Columbia's normal payroll procedures, Hinson's paycheck for the period covering June 25, 2004 was deposited directly into his bank account on July 2nd. The deposit included payment for a full day's work on June 25, 2004 despite the fact that he had notified administrative staff that he was leaving early and his superiors were aware that he was not present for the full day. Hinson testified that his paychecks were all for about the same amount, and that when he received a memorandum of deposit in the mail he usually put the envelope in a drawer at home without opening it. He stated that he didn't expect the city to pay him for Friday, June 25th, and that he didn't realize they had done so until he learned on July 12, 2004 that his employment was being terminated.

II. ADMINISTRATIVE AND COURT PROCEEDINGS

A.

After the foregoing events, the City's Director of Public Works sent Hinson a letter dated July 9, 2004, to inform him that the Department was recommending termination of his employment because "you falsified your time for Friday, June 25, 2004." The letter also stated that "you have continued to try to cover-up the fact you did not spend the entire day at work," and it pointed out that Mr. Hinson's leave form did not address his absence of June 25th. The letter further stated, "[t]his is the second time you tried to use improper leave time, which should not happen since you have been employed by the City a long time and should know leave time rules."[1]

Upon receiving the letter, Hinson asked for a predetermination hearing, which was conducted on July 12, 2004 with the City Manager, the Personnel Director and the Public Works Director in attendance. *See* Tenn. Code Ann. § 8-30-331. After discussion, the hearing panel decided to terminate Mr. Hinson's employment. It notified him by letter of its decision, and of his right to file an appeal of the decision with the Civil Service Board.

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[1]The mention of an earlier incident apparently refers to Mr. Hinson's attempt to use sick leave time the previous winter to care for his father, who was gravely ill. A city administrator refused to allow him to take sick leave for someone not a member of his immediate family, so Mr. Hinson used his vacation leave instead. Upon learning of the administrator's decision, Mr. Hinson became very upset, and allegedly said he would get that time back one way or another.

The City Manager later prepared a "Specification of Charges" for the use of the Civil Service Board. The document discussed in detail the events of June 25th, noted that the City's Policy and Procedures Manual addresses the offense of falsifying time, and quoted language from the manual in regard to that offense. A copy of the Specification of Charges was sent to Mr. Hinson.

B.

Hinson appealed the decision reached at the predetermination hearing to the Civil Service Board. The Civil Service Board hearing was conducted approximately four months later on November 9, 2004 before a hearing officer and a five-member panel. Both the City and Hinson were represented by counsel. The panel heard testimony from Hinson as well as from his neighbor Chris Lindsey, City Personnel Director Kate Collier, and Assistant Public Works Director Dana Stahl.

The city stipulated at the outset of the hearing that Hinson did not clock himself out on Friday, June 25th, that he was not on city property at 3:26 p.m., and that he was at home protecting his family. Hinson denied that he asked any other employee to clock out on his behalf.

Exhibits entered into the administrative record included employee performance evaluation reports for Hinson dating from 1993 to 2000, which showed that his work was consistently good or at the very least acceptable. The record also contains information about an accident involving Hinson that occurred in May of 2003 and its disciplinary aftermath. He was in the bucket of a lift truck working on a traffic light when the truck was hit by a tractor-trailer.

A drug test was administered to Hinson after the accident, and it came back positive for cocaine. The city considered terminating him at that point, and conducted a predetermination hearing. However, the City and Hinson ultimately agreed that he would be given a four day unpaid suspension and a one year probation, that he be subject to random drug testing and that he undergo mandatory drug counseling. The city does not contend that Hinson was still on probation at the time of the incident that gave rise to this case.[2]

Since there was no proof of deliberate wrongdoing on Hinson's part in regard to his time card for June 25th, the City focused its arguments instead on his failure to notify it of the overpayment on his paycheck or to offer reimbursement for it. The city contended that this failure constituted a knowing violation of city regulations, which warranted termination.

Hinson stated under questioning that he was not aware of the overpayment until the day of the predetermination hearing at the earliest. He testified that he did not wish to be paid for work he did not do. When asked why he did not offer to repay the city after the predetermination hearing, he responded "I was trying to look for ways to make money to keep my family going."

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[2]The City Attorney suggested in oral argument that Mr. Hinson's termination was based in part on the Board's awareness of earlier incidents in violation of City regulations. Under questioning by this court, however, he conceded that the stated reasons for the Board's decision only involved the events of June and July 2004, and that our review should accordingly be limited to those events.

Kate Collier was questioned about the predetermination hearing, which she had attended. She testified that when Hinson was asked why he didn't submit a leave request for June 25th, he didn't give any explanation, and he didn't offer to return the money he had been overpaid. When asked to explain on cross-examination her understanding of how Hinson had falsified his time, she responded, "the hours worked that he got paid for on Friday when he was not there, and the fact that he didn't fill out the proper paperwork to get vacation time for that."

Dana Stahl testified that he was not in the office on June 25th, but that he was present on the following Monday and Tuesday. He knew by Tuesday that Hinson had been absent on Friday, and that his time card showed him clocking out on 3:26 p.m. on that day. He had a talk with Hinson on Tuesday. Hinson acknowledged that he left early on Friday, but denied knowing how he got clocked out that day. Stahl asked him why he did not fill out any paperwork to cover that Friday, but, "I didn't get a clear response. He said he was upset, extremely upset, and he was extremely concerned about his family." Stahl was asked on cross-examination, "Is there a written policy that says an employee must submit leave time for the first day that they miss work?" Stahl responded that he didn't know.

At the close of proof, the Civil Service Board voted unanimously to uphold the termination of Hinson's employment. The Order memorializing the Board's decision declared, "[t]he Board made the specific finding that Mr. Hinson's actions in regard to his receipt of compensation for hours for which he admittedly was absent from work, all as detailed in the specification of charges dated August 26, 2004 constitute a 'falsification of time' and that under the Personnel Policy and Procedures Manual for the City of Columbia, termination for this offense is justified without regard to an employee's prior work record."

C.

On January 10, 2005, Hinson filed a complaint against the City of Columbia in the Maury County Chancery Court, in accordance with Tenn. Code Ann. § 27-9-114(b)(2), which states that "petitions for judicial review of decisions by a city or county civil service board affecting the employment status of a civil service employee shall be filed in the chancery court of the county wherein the local civil service board is located."

Hinson asked the court to reverse the action of the Civil Service Board and to reinstate him in his job. A memorandum in support of the complaint stated two arguments: (1) that because the specification of charges only addressed falsification of time, Hinson did not receive adequate notice of the charge that was ultimately tried and upon which the Board based its decision and (2) that the record did not contain substantial and material evidence to support the Board's decision.

The City responded that all the written documents in the record that set out falsification of time also mention Hinson's failure to ask for leave for June 25th. The City accordingly reasoned that Hinson had received adequate notice that the Board would be looking into the pay issue, and that it was a logical component of the offense of falsification of time.

The Chancery Court heard the case on June 9, 2006, and entered a judgment on July 12, 2006 which affirmed the Board. The judgment stated that "plaintiff clearly understands that falsifying time records and getting pay not earned were essentially the same issue, with the second being a consequence of the first." This appeal followed.

III. ANALYSIS

A. Issues

The issues on appeal to this court are the very same ones that were presented to the Chancery Court for the initial judicial review of the Civil Service Board's decision:

> (1) whether the appellant received notice of the charges against him adequate to protect his due process rights.
>
> (2) Whether there was substantial and material evidence to support the Civil Service Board's determination.

B. The Standard of Review

Hinson filed his complaint in the Chancery Court under Tenn. Code Ann. § 27-9-114, which declares that proceedings which affect the employment status of civil service employees shall be conducted as contested case hearings, in accordance with the Administrative Procedures Act. *See City of Memphis v. Civil Service Comm'n of City of Memphis*, 216 S.W.3d 311, 315-316 (Tenn. 2007).

The judicial standard of review for contested case hearings is set out in Tenn. Code Ann. § 4-5-322 of the Administrative Procedures Act. Section (g) of the statute confines judicial review to the record made before the administrative agency. Section (h) provides the courts with a limited number of statutory grounds which they may apply to reverse or modify the decision below. These are when "the administrative findings, inferences, conclusions or decisions" are,

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
> (5)(B) In determining the substantiality of the evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on

questions of fact.

Tenn. Code Ann. § 4-5-323 allows a party aggrieved by a decision of the trial court to seek review in the Court of Appeals. The record on appeal is made up of both the record certified to the Chancery Court and the record made before the Chancery Court.[3] Tenn. Code Ann. § 4-5-323(b). Cases are reviewed in the Court of Appeals under the same standard of review as in the trial court. *See City of Memphis*, 216 S.W.3d at 316; *Humana of Tennessee v. Tennessee Health Facilities Commission,* 551 S.W.2d 664, 668 (Tenn. 1977); *Dickson v. City of Memphis Civil Service Comm'n*, 194 S.W.3d 457, 464 (Tenn. Ct. App. 2005).

Accordingly, this court may reverse the trial court only if we find that there was a violation of one or more of the statutory grounds set out in Tenn. Code Ann. § 4-5-322. Although we must examine the evidence in order to conduct a thorough review of the questions appealed, the trial court's determinations in regard to the statutory grounds must be considered conclusions of law rather than findings of fact. *See Watts v. Civil Service Bd. for Columbia,* 606 S.W.2d 274, 277 (Tenn. 1980). Accordingly, our review of the trial court's conclusions are *de novo*, without a presumption of correctness. Tenn. R. App. P. 13(d); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000).

C. The Question of Notice

Tenn. Code Ann. § 8-30-331 declares that civil service employees who have successfully completed their probationary period have a property right to their positions. Such a property right gives rise to a constitutional right to due process, which must be satisfied before the state may validly deprive the employee of his employment. See *Cleveland Board of Education v. Loudermilk*, 470 U.S. 532, 538-39 (1985); *Case v. Shelby County Civil Service Merit Board,* 98 S.W.2d 167, 172 (Tenn. Ct. App. 2002); *Armstrong v. Dept. of Veterans Affairs,* 959 S.W.2d 595, 598 (Tenn. Ct. App. 1997).

The constitutional due process right is echoed in the statute, which states that "no suspension, demotion, dismissal or any other action which deprives a regular employee of such employee's 'property right' will become effective until minimum due process is provided . . ." Tenn. Code Ann. § 8-30-331(b). The requirements of minimum due process include proper notice, which has been defined as "'notice reasonably calculated under all the circumstances to apprise interested parties of the claims of the opposing parties." *Sanford v. Tennessee Dept. of Environment,* 992 S.W.2d 410, 414 (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The statute specifically declares that "[t]he employee shall be notified of the charges. Such notification should be in writing and shall detail times, places, and other pertinent facts concerning the charges." Tenn. Code Ann. § 8-30-331(b)(1).

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[3]We note that Tenn. Code Ann. § 4-5-322(g) allows the trial court to take proof as to alleged irregularities in procedure before the agency below which are not shown in the administrative record.

By giving an individual adequate notice, he is provided with the opportunity to make adequate preparation and surprise is reduced. *Sanford v. Tennessee Dept. of Environment*, 992 S.W.2d 410, 415 (Tenn. Ct. App. 1998). Thus, notice should be "full and accurate enough to apprise those affected by it of the significance of the notice." *Holland v. King*, 288 S.W.2d 448 (Tenn. 1956). "Notice which is a mere gesture is not notice." *U.S. Life Title Ins. v. Dept. of Commerce,* 770 S.W.2d 537, 541 (Tenn. Ct. App. 1988); *Burden v. Burden*, 313 S.W.2d 566, 570 (Tenn. Ct. App. 1957).

The question for our review is whether the notice furnished to Hinson was adequate to inform him of the charges upon which the City intended to rely.

There are three documents in the record that are relevant to the question of the adequacy or inadequacy of the notice that Hinson received.[4] In his letter of July 9th recommending Hinson's termination, the Public Works Director recited the events involving his time card and noted that his leave form did not address his absence of June 25th. The City Manager's letter of July 12th notifying Mr. Hinson of the decision to terminate him from his job also recites the known facts related to the events of June 25th and states that "[b]ecause you were clocked out at 3:26 p.m. on June 25th you were paid as if you worked." It then cites the following language in the Personnel Policy and Procedures Manual: "Falsifying time is considered a very serious offense and cause for immediate dismissal regardless of an employee's prior work record."

In drafting the Specification of Charges, the City had the opportunity to distill all the information it had previously gathered about the case, including the two letters previously cited, into a single document that could summarize for both Mr. Hinson's benefit and that of the Civil Service Board the charges that would be tried in the upcoming Board hearing. It is, accordingly, the most important document in the record for gauging the adequacy of notice. The resulting document is two and a half pages long. It recites in narrative form many of the facts we have set out above.

The document begins with a discussion of Hinson's 2003 work-related vehicle accident, and then continues with details of the events of June 2004. After reciting the fact that Mr. Hinson completed a leave slip for eight hours of vacation on June 28th and nothing for June 25th, it goes on to say that "Mr. Hinson must have had knowledge that he was clocked out at the end of the day on June 25th. Mr. Hinson offered no explanation for not requesting vacation leave for the 25th at the predetermination hearing."

The document then cites the city's zero-tolerance attitude for falsifying time, and quotes verbatim the following passage from the city's Personnel and Procedures Manual:

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[4]The City attempts to bolster its argument that Hinson received proper notice by referring to a conversation between Hinson and Stahl on June 29th concerning Hinson's leave request. But that conversation does not meet the requirement of written notice as set out in Tenn. Code Ann. § 8-30-331(b)(1), and in any case its content was at best peripheral to the unstated charge of receiving money not earned.

> Falsifying time is considered a very serious offense and cause for immediate dismissal regardless of an employee's prior work record. Falsifying time includes but is not limited to using any employees time/identification card to "clock in," in their absence, entering a punch at the time-clock for another employee in their absence, or editing an employee's time to add or remove hours or money to which they are not otherwise entitled.

As the above implies, the only current charge against Hinson that is cited in the Specification of Charges is falsifying time. The above-quoted passage cites a number of actions that can constitute falsifying time, but we note that it does not specify the mere receipt of money as one of them. The manual does state that actions constituting falsifying time are not limited to the examples cited. There is, however, no mention at all in the Specification of Charges that Hinson was paid for June 25th or that he failed to return the money wrongfully received.

Hinson asserts that in accordance with the Specification of Charges, he prepared to meet the allegation that he had falsified time by clocking out on June 25th. He obtained affidavits from Chris Lindsey and from Maury County Sheriff's detective Andy Jackson to the effect that he was at his home at around 3:26 p.m., and he submitted copies of those affidavits to the City. He did not gather evidence about the system the City uses to pay its employees, nor did he explore its policies and procedures in regard to paid and unpaid leave, or as to reimbursement of money paid by the City in error. Thus, when the City conceded at the outset of the Board hearing that Hinson did not himself clock out on June 25th, he was unprepared to meet its new theory.

The City argues that falsification of time and receipt of unearned pay are two facets of the same offense, and thus that Hinson received sufficient notice that the content of his paycheck of July 2nd would be an issue at the Board hearing. The chancellor clearly found that argument to be persuasive, because his final order states that "plaintiff clearly understands that falsifying time records and getting pay not earned were essentially the same issue, with the second being a consequence of the first." The flaw in the City's argument is that it requires us to assume that Hinson had in fact falsified his time records, when the City conceded that it was unable to prove that he had done so. It also ignores the fact that the City knew that Hinson was not entitled to be paid for the whole day of June 25th, but paid him anyway.

Accordingly, the specification of charges only gave Hinson notice that the City intended to put on proof as to wrongdoing on his part in allegedly falsifying the time he worked, but the decision the Board reached was based on a related but different ground. Thus, Hinson did not receive proper notice of the charge against him and was thereby deprived of the due process to which he was constitutionally and statutorily entitled.

D. Substantial and Material Evidence

Hinson's second argument on appeal is that there is no substantial and material evidence in the record to support the Board's decision. Another argument, although not raised in the appellant's

brief, is that the Board's decision was "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *See* Tenn. Code Ann. § 4-5-322(h)(4). Since we have found that the Civil Service Board failed to give Hinson adequate notice of the charge that was tried, we are required to reverse both the Board and the trial court which upheld its decision. Thus, even if, as the City contends, there is substantial and material evidence in the record as to the ground the Board actually based its decision upon, that issue is pretermitted, because the lack of notice prevented Hinson from making preparations to respond effectively to the evidence presented. In the interest of thoroughness, however, we will briefly discuss the question.

As we noted above, the trial court is authorized to reverse a Board decision that is "unsupported by evidence that is both substantial and material in the light of the entire record." Tenn. Code Ann. § 4-5-322(h)(5). Further, "[i]n determining the substantiality of the evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."

The statute does not define what constitutes material and substantial evidence, but our cases indicate that it is "something less than the preponderance of the evidence, but more than a scintilla or glimmer." *Wayne County v. Solid Waste Disposal Control Board*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988). "Substantial evidence is not limited to direct evidence but may also include circumstantial evidence or the inferences reasonably drawn from direct evidence." *Ibid.* The chancellor noted that there was only circumstantial evidence of Hinson's participation in wrongful conduct, but it held that "such circumstantial evidence constitutes substantial and material evidence to support the findings of the Board." The circumstantial evidence cited by the trial court were:

> "(1) his failure to clock himself out when he actually left on June 25; (2) the lack of any explanation as to who entered time on the plaintiff's card at 3:26 p.m; (3) his failure to seek a leave for June 25; (4) his acceptance of full pay for that day; (5) his failure to reimburse the city for the overpayment on July 9 or 12; and (6) his Board testimony that he 'was trying to look for ways to make money to keep my family going' when asked if he attempted to give the money back."

As we review the record, we find evidence that fairly detracts from the weight of each of the circumstances recited by the trial court as follows: (1) the evidence showed that Mr. Hinson failed to clock out because he was upset about the possible danger his family faced from an alleged murderer but that he notified administrative staff that he was leaving, which the city does not dispute; (2) while Hinson could not explain who had checked out on his time card, the record suggests that the cards were accessible to all employees, including supervisory personnel; (3) Hinson testified that he was entitled to only one day of paid leave, and the City did not attempt to disprove his testimony or to prove anything about its procedures for applying for unpaid leave; (4) Hinson's paycheck was directly deposited into his account, so he had no choice but to accept it; (5) the evidence suggests that Hinson did not become aware that he had been overpaid until July 12; and (6) the testimony cited was given four months after he was terminated from his job, when family needs were without doubt uppermost in his mind.

While these observations do not totally negate the circumstantial evidence that the trial court cited, they weaken it considerably, and they require us to focus on some inherent problems with the City's theory that Hinson was guilty of deliberate wrongdoing. The testimony of the Assistant Public Works Director showed that the City knew that Hinson was not there for the entire day on Friday and was not entitled to be paid, yet the City paid him for that day, and then essentially fired him for receiving the pay. The City's attorney tried to explain this away by stating that "the left hand doesn't know what the right hand is doing," but it is difficult to understand why Hinson should be punished for the City's mistake.

Further, Hinson testified that he wasn't aware that he had been paid for June 25th until the predetermination hearing of July 12th. Ms. Collier testified that he didn't offer to pay the money back at the hearing, but the City apparently never asked that it be returned. Of course, if the money itself was the crux of the issue, the City could have corrected the problem by simply deducting the improper payment from Hinson's next paycheck, but there were no indications that it had even considered doing so.

When we consider the City's own significant role in the very conduct it complains of, as well as the entire record, we have determined that the Board's decision must be considered arbitrary or capricious, and must be reversed on that ground as well as on the ground of inadequacy of notice. As to the pretermitted issue of whether the proof that was presented meets the requirement of material and substantial evidence it is very questionable.

IV.

The judgment of the trial court is reversed. We remand this case to the Chancery Court of Maury County for any further proceedings necessary. The costs on appeal are taxed to the appellee, the City of Columbia.

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E. RILEY ANDERSON, SP. JUDGE